115-221

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1883.**

No. ~~8866~~ 3

THE BOSTON HYDRAULIC GOLD MINING COMPANY, PLAINTIFF IN ERROR,

*vs.*

THE EAGLE COPPER AND SILVER MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

**FILED OCTOBER 10, 1881.**

# SUPREME COURT OF THE UNITED STATES.

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INDEX.


| | Original. | Print. |
|---|---|---|
| Writ of error | *a* | 1 |
| Citation | *c* | 2 |
| Summons | 1 | 2 |
| Marshal's return | 3 | 2 |
| Complaint | 5 | 3 |
| Affidavit of service of answer | 12 | 5 |
| Answer | 14 | 6 |
| Amended complaint | 20 | 8 |
| Affidavit of service of answer to amended complaint | 28 | 10 |
| Answer to amended complaint | 30 | 11 |
| Findings | 37 | 12 |
| Judgment | 57 | 19 |
| Certificate to judgment roll | 60 | 20 |
| Bill of exceptions | 62 | 20 |
| Bond | 64 | 21 |
| Clerk's certificate | 68 | 22 |


JUDD & DETWEILER, PRINTERS, WASHINGTON.

*a* UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the United States of the ninth judicial circuit in and for the district of California, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Boston Hydraulic Gold Mining Company, plaintiff in error, and The Eagle Copper and Silver Mining Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 30th day of September, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

[SEAL.] L. S. B. SAWYER,
*Clerk U. S. Circuit Court, 9th Cir., Dist. Cal.*

The above writ of error is hereby allowed.

LORENZO SAWYER,
*U. S. Circuit Judge, Ninth Jud'l Circuit.*

*b* *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

[SEAL.] LORENZO S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

Endorsed: 2056. United States Supreme Court. The Boston Hydraulic Gold Mining Company, plaintiff in error, *vs.* The Eagle Copper and Silver Mining Company, defendant in error. Writ of error. Filed 11th October, A. D. 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, d'p'y cl'k.

c UNITED STATES OF AMERICA, *ss:*

To The Eagle Copper and Silver Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1880, pursuant to a —— filed in the clerk's office of the circuit court of the United States, wherein The Boston Hydraulic Gold Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, U. S. circuit judge, ninth circuit, district of California, this 30th day of September, A. D. 1880, and of the Independence of the United States the 105th.

[SEAL.] LORENZO SAWYER,
*U. S. Circuit Judge, Ninth Circuit.*

Endorsed: United States Supreme Court. The Boston Hydraulic Gold Mining Company, plaintiff in error, *vs.* The Eagle Copper and Silver Mining Company, defendant in error. Citation. Receipt of a copy of the within citation is hereby acknowledged this 11th day of October, A. D. 1880. Stewart, Vanclief & Herrin, att'ys for def't in error. Filed October 11th, 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

1 *Summons.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, of the Ninth Circuit, in and for the District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, a corporation under the laws of Massachusetts, Plaintiff,

*vs.*

THE EAGLE COPPER AND SILVER MINING COMPANY, under the laws of California, Defendant.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America, Greeting:

To the Eagle Copper and Silver Mining Company, Defendant:

2 You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court in the city and county of San Francisco within ten days after the service on you of this summons,

if served in this county, or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to obtain judgment against said defendant for the possession of certain land and premises situated in the county of Calaveras, State of California, and more fully described in the complaint herein, together with the sum of thirty thousand dollars, the value of the rents and profits thereof
3 and the injury sustained by plaintiff, and also for the costs of this action, and if you fail to appear and plead, answer, or demur, as herein required, default will be entered against you, and each of you, and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 3d day of March, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the 103d.

[SEAL.] LORENZO S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

Endorsed: U. S. marshal's office, district of California. I hereby certify that I received the within summons the 3d day of March, A. D. 1879, and personally served the [same on the 3d day of
4 March, A. D. 1879, by delivering to and leaving with F. W. Utter, secretary of the Eagle Copper and Silver Mining Company, said defendant, personally, a copy of said summons, attached to a certified copy of the complaint. City and county of San Francisco, district of California. A. W. Poole, U. S. marshal. By Geo. W. Foster, deputy. Filed March 4th, 1879. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

5 *Complaint.*

Circuit Court of the United States, District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, a corporation under the laws of Massachusetts,

*vs.*

THE EAGLE COPPER AND SILVER MINING COMPANY, a corporation under the laws of California.

The complaint of the said Boston Hydraulic Gold Mining Company, plaintiff, shows to this honorable court that said plaintiff is a corporation organized under the laws of the Commonwealth of Massachusetts, one of the United States, and a citizen thereof, with its office for the direction of its business located in the city of Boston, in said State.

That the Eagle Copper and Silver Mining Company, defendant, is a corporation under the laws of the State of California, and
6 citizen of that State, with its office for the direction of its business located in the city and county of San Francisco.

That on the 25th day of February, A. D. 1879, the said plaintiff was seized and possessed as owner in fee and entitled to the posses-

sion, and ever since has been such owner and entitled to the possession, of all that certain mineral-bearing or quartz-lode mining claim, or piece or parcel of land situated and being within the Gopher mining district, heretofore so called, in the county of Calaveras, and State of California, said claim being situated on the north side of Gopher creek, near the residence (heretofore) of Hiram Hughes, and about one and a half miles from Telegraph City in a northwesterly direction, and known as the Original Hughes Claim or Quail Hill No. 1, described as follows, to wit: Commencing at an oak tree one hundred and fifty feet east of Tunnel gulch,
7 running thence in a northwesterly direction eighteen hundred (1800) feet, by three hundred (300) feet in width, being twelve mining claims, each of hundred and fifty feet, with all the dips, spurs, angles, and variations of said lode.

And, also, all that other mineral bearing or quartz lode mining claim or piece of land situated in said Gopher mining district in the county of Calaveras aforesaid, adjoining the said original Hughes claim, or Quail Hill No. 1, hereinbefore described, known as Hughes' claim No. 2, being eighteen hundred (1800) feet in length and three hundred feet in width, and is described as follows, to wit: The southeastern boundary of said claim or piece of land is a line three hundred feet in length, being the southwesterly prolongation of the line forming the southeast boundary of said original Hughes claim, or Quail Hill No. 1, above described; beginning at this line, this claim (Hughes' No. 2) runs in a northwest-
8 erly direction parallel to and adjoining the said original Hughes claim, and on the southwest side of it and three hundred feet in width a distance of eighteen hundred feet, with all the dips, spurs, angles, and variations of said lode.

And, also, all that other piece or parcel of land situated in said Gopher mining district and county of Calaveras, bounded and described as follows: Commencing at the corner No. 1 of claim, thence run north 60° W. 8 chains, thence south 30° W. 6 chains, thence S. 60° E. 8 chains, thence N. 30° E. 6 chains, to the place of beginning; all the aforedescribed land and premises containing and being the land and premises otherwise described or designated by the field-notes and official plat on file in the United States land office at Stockton, California, as lot No. 41, in township 1 north, range 11 east, of Mount Diablo base and meridian. The exterior boundaries of said lot No. 41 being as follows, to wit: Variations $16\frac{1}{2}°$
9 east, commencing at the southeast corner of claim, from which the quarter-section corner between sections 3 and 10, T. 1 N., R. 11 E. bears south $76\frac{1}{2}°$ W. 11.25 ch's, thence run north 60° W. 22.72 ch's, thence north 30° E. 9.09 ch's, thence S. 60° E. 22.72 ch's, thence S. 30° W. 9.09 ch's, to the place of beginning; containing $20\frac{65}{100}$ acres. And, also, that other piece or parcel of land bounded and described as follows: Commencing at the corner No. 1 of claim, thence run north 60° W. 8 ch's, thence south 30° W. 6 ch's, thence S. 60° E. 8 ch's, thence N. 30° E. 6 ch's, to place of beginning, containing $4\frac{80}{100}$ acres.

That the plaintiff being so possessed thereof, the said defendant

thereafterwards, to wit, on March 1st, A. D. 1879, unlawfully entered upon said premises and ousted said plaintiff therefrom, against its will and title, and said defendant still unlawfully withholds the possession thereof from the plaintiff, to its damage in the sum of thirty thousand dollars ($30,000), being the value of the rents
10 and profits thereof, and the injury sustained, whereof the plaintiff demands judgment against the defendants, that they surrender the possession of said land and premises to the plaintiffs, and pay them the sum of thirty thousand dollars damages for the injury and unlawful withholding thereof, together with the costs and disbursements of this action.

THE BOSTON HYDRAULIC GOLD MINING COMPANY,
By A. K. P. JOY, *Attorney.*

STATE OF CALIFORNIA, }
*City and County of San Francisco,* } *ss:*

John B. Reynolds, being first sworn, says that he purchased the premises described in the foregoing complaint, and has represented the above-named plaintiff in California, as agent or otherwise; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his knowledge and belief,
11 except as to the matters there stated on information and belief, and as to those, he believes them to be true. This deponent further says that the plaintiff in this action is a corporation under the laws of Massachusetts, and that the president and secretary of said company reside out of the State of California, and therefore makes this affidavit on behalf of the plaintiff.

JOHN B. REYNOLDS.

Subscribed and sworn to this 3d day of March, A. D. 1879, before me.

[SEAL.] S. D. CRAIG, *Notary Public.*

Filed 3d March, 1879.

L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE.

12 *Affidavit of Service of Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, Plaintiff.
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY, Defendant.

Affidavit of service of answer.

STATE OF CALIFORNIA, }
*City and County of San Francisco,* } *ss:*

Frank Vernon, being first duly sworn, deposes and says, that he is the clerk of Messrs. Stewart, Vanclief & Herrin, the attorneys for

the defendant in the above-entitled cause, and a person over the age of eighteen years, and not a party to the above-entitled action.

That he served the annexed answer upon A. K. P. Joy,
13 the attorney for the plaintiff in said action, on the 13th day of March, A. D. 1879, by putting a true copy of the same, enclosed in an envelope, in the post-office at San Francisco, on said day, postage prepaid, and directed to said attorney.

That said attorney has no office in the city and county of San Francisco, nor any residence therein, to affiant's knowledge, although he has made diligent inquiry respecting the same.

That the residence of said attorney is not known to affiant, or to the defendant or its attorneys, and for that reason the service of said answer was made as aforesaid.

FRANK VERNON.

Subscribed and sworn to before me, this 13th day of March, A. D. 1879.

[SEAL.] HOLLAND SMITH,
*Notary Public.*

14 *Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, a corporation under the laws of Massachusetts, Plaintiff,

*vs.*

THE EAGLE COPPER AND SILVER MINING COMPANY, a corporation under the laws of California, Defendant.

For answer to the complaint of the plaintiff in the above-entitled action the defendant therein states:

Said defendant denies that on the 28th day of February, A. D. 1879, or at any time, the said plaintiff was seized or possessed as owner in fee, or otherwise, or at all, or was at any time, or now
15 is, entitled to the possession of said mining claim, land, and premises, or any part thereof described in said complaint.

Said defendant denies that on March 1st, A. D. 1879, or at any other time, it unlawfully entered upon said premises, or ousted said plaintiff therefrom against its will or title or otherwise, or that said defendant now unlawfully withholds, or at the commencement of this action, or at any other time unlawfully withheld the possession thereof from said plaintiff, or that said alleged withholding was to the damage of the plaintiff in the sum of $30,000, or any other sum whatever, or that the plaintiff has sustained damage in any sum whatever by reason of any act or acts of the defendant in relation to the mining claims or property described in said complaint.

Said defendant alleges that it now is, and for more than
16 two years last past has been, the owner in fee, and in possession of said mining claim and premises, and every part thereof

Said defendant, for a further and separate defense, herein alleges

that the said mining claim and premises described in said complaint is a part of the land belonging to the United States containing valuable mineral deposits of gold, silver, and copper in lodes of quartz and other rock in place, and constitutes a mining claim upon such lodes of rock; that no patent has ever been issued by the United States therefor to any person or persons, natural or artificial.

That since the 10th day of May, 1872, no labor has been performed or improvements made on said ground or mining claim of any value whatever by or for the plaintiff, or by any other person or persons under whom plaintiff claims title or right of possession to the same.

17 That on the 25th day of September, 1876, the grantors of the defendant entered upon and located the said ground and premises as a lode mining claim according to the laws of the United States, and the local rules and regulations of miners of the mining district in which said mining claim is situate, and afterwards and before the commencement of this action conveyed the same to this defendant, who has been at all times since and now is the owner, and in possession thereof.

That during each year since said location the said defendant and its grantors have done and performed upon said claim more than ($100) one hundred dollars' worth of labor, and have in all respects complied with the laws of the United States, and the rules and regulations of said mining district.

18 Wherefore defendant prays that it be dismissed hence, with judgment for its costs.

STEWART, VANCLIEF & HERRIN,
*Attorneys for Defendant.*

STATE OF CALIFORNIA, }
*City and County of San Francisco,* } *ss:*

F. W. Utter, being first duly sworn, deposes and says that he is an officer, to wit, secretary of the Eagle Copper and Silver Mining Company, the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

F. W. UTTER.

Subscribed and sworn to before me, this eleventh day of March, A. D. 1879.

[SEAL.] J. H. BLOOD, *Notary Public.*

19 Endorsed: Filed 13 March, A. D. 1879. L. S. B. Sawyer, clerk.

20 *Amended Complaint.*

Circuit Court of the United States, District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, Complainant,
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY, Defendant.

And now the complainant comes, and with leave files the following amended complaint in said cause:

The amended complaint of The Boston Hydraulic Gold Mining Company, the plaintiff in said cause, shows to this honorable court that said plaintiff is a corporation under the laws of Massachusetts, one of the United States, and citizen of that State, with its principal office for the direction of its business located in the city of Boston, in that State.

21 That The Eagle Copper and Silver Mining Company, defendant, is a corporation under the laws of the State of California, and citizen of that State, with its principal office for the direction of its business located in the city of San Francisco.

That on February 28th, A. D. 1879, and long before that date, the plaintiff was owner in fee and entitled to the possession, and ever since the date last named has been such owner, and entitled to the possession, of all that certain mineral-bearing or quartz-lode mining claim or parcel of land, with the dwelling-house, blacksmith shop, stable, and other buildings and improvements thereon, situated and being within the Gopher mining district, (and heretofore so called,) in the county of Calaveras, and State of California, which said lode mining claim and piece of land is located on the north side of Gopher creek, near the residence heretofore of Hiram Hughes,

22 and about one and a half miles from Telegraph City, in a northwesterly direction, and known as the original Hughes claim or Quail Hill, No. 1, described as follows, to wit: Commencing at an oak tree one hundred and fifty feet east of Tunnel gulch; running thence in a northwesterly direction eighteen hundred (1800) feet, by three hundred (300) feet in width, being twelve mining claims, each of one hundred and fifty feet, with all the dips, spurs, angles, and variations of said lode, and with all tunnels, shafts, drifts, and cuts in the same, and leading thereto.

And, also, all that other mineral-bearing or quartz-lode mining claim and piece of land situated in said Gopher mining district, in the county of Calaveras aforesaid, adjoining the said original Hughes claim, or Quail Hill No. 1, hereinbefore described, known as Hughes' claim No. 2, being eighteen hundred (1800) feet in length and

23 three hundred (300) feet in width, and is described as follows, to wit: The southeastern boundary of said claim or piece of land is a line three hundred feet in length, being the southwesterly prolongation of the line forming the southeast boundary of said original Hughes claim, or Quail Hill No. 1, above described. Beginning at this line, this claim (Hughes' No. 2) runs in a northwesterly direction, parallel to and adjoining the said original Hughes claim and on the west side of it, and three hundred feet in width, a dis-

tance of eighteen hundred feet, with all the dips, spurs, angles, and variations of said lode, and with all the tunnel, shafts, drifts, and cuts therein, and the buildings and improvements thereon.

And, also, all that other piece of land situated in said Gopher mining district, bounded and described as follows, to wit: Commencing at the corner No. 1 of claim, thence running N. 60° W. 8 chains,
24 thence S. 30° W. 6 chains, thence S. 60° E. 8 chains, thence N. 30° E. 6 chains, to the place of beginning, all the aforedescribed land and premises containing and being the land and premises otherwise described or designated by the field-notes and official plat on file in the United States land office at Stockton, California, as lot No. 41, in township 1 north, range 11 east, of Mount Diablo base and meridian, the exterior boundaries of said lot No. 41 being as follows, to wit: Variations $16\frac{1}{2}$* east, commencing at the southeast corner of claim from which the quarter-section corner, between sections 3 and 10, township 1 north, range 11 east, bears south $76\frac{1}{2}$° west 11.25 chains, thence runs north 60° west 22.72 chains, thence north 30° east 9.09 chains, thence south 60° east 22.72 chains, thence south 30° west and 909 chains to place of beginning, containing $20\frac{65}{100}$ acres; and also that other piece of land, described as follows, to wit: Commencing at the corner No. 1 of claim,
25 thence run north 60° west 8 chains, thence south 30° west 6 chains, thence south 60° east 8 chains, thence north 30° east 6 chains to place of beginning, containing $4\frac{81}{100}$ acres.

That the plaintiff, being so possessed thereof, the said defendants thereafterwards, to wit, on March 1st, A. D. 1879, unlawfully entered upon said premises and ousted said plaintiff therefrom, against its will and title, and said defendant still unlawfully withholds the possession thereof from said plaintiff, to its damage in the sum of ($40,000) forty thousand dollars, being the value for the rents and profits thereof, and of the injury sustained.

Wherefore the plaintiff demands judgment against the defendants, that they surrender the possession of said land, mining claim, lode, veins, tunnels, shafts, drifts, cuts, buildings, improvements, and premises to the plaintiff, and pay them the sum of forty thou-
26 sand dollars damages for the injury and unlawful withholding thereof, together with the costs, expenses, and disbursements of this action.

THE BOSTON HYDRAULIC GOLD MINING COMPANY,
By A. K. P. JOY, *Attorney.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

BOSTON, *May 27th*, 1879.

J. B. Reynolds, interested in and acting for the plaintiff within named, deposes and says, that the matters stated in the within complaint are true, excepting those stated on information and belief, and as to these, he believes them true.

JOHN B. REYNOLDS.

SUFFOLK, *ss:*

BOSTON, MASS., *May 27th*, 1879.

Then personally appeared the above-named J. B. Reynolds, before me, a notary public, at said Boston, and made oath to the statement above written, signed by him.

27 [SEAL.] A. K. P. JOY,
*Notary Public, duly commissioned and qualified for said County of Suffolk; witness my hand and seal.*

Endorsed: Due service of the within amended complaint is hereby admitted, this 7th day of ——, A. D. 1879. Stewart, Vanclief & Herrin, att'ys for def't. Filed July 7, 1879. L. S. B. Sawyer, clerk.

28 *Affidavit of Service of Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, a corporation under the laws of Massachusetts, Plaintiff,

*vs.*

THE EAGLE COPPER AND SILVER MINING COMPANY, a corporation under the laws of California, Defendant.

STATE OF CALIFORNIA,
*City and County of San Francisco,* } *ss:*

S. Aldrich, being first duly sworn, deposes and says that he is, and was at all the times herein mentioned, a person over the age of eighteen years, and not a party to the above-entitled action. That during said times he was the clerk of Stewart, Vanclief &
29 Herrin, the attorneys for the defendant in said action; that said attorneys reside and have their offices at San Francisco, in the State of California, and that A. K. P. Joy, the attorney for the plaintiff in said action, resides in the city of Boston, in the State of Massachusetts, and has his office at number 53 Equitable Building, 150 Devonshire, corner Milk, street, Boston, Massachusetts, and that between said places there is a regular communication by mail; that on the 11th day of August, 1879, affiant served the annexed answer in said action upon said Joy, for the defendant and its attorneys, and at their request, by depositing in the post office on said day at said city of San Francisco, a copy of said answer, enclosed in a sealed envelope, postage prepaid, and addressed to said Joy at his said office and place of residence as aforesaid.

S. ALDRICH.

30 Sworn to and subscribed before me, this 11th day of August, A. D. 1879.

[SEAL.] HOLLAND SMITH,
*Notary Public.*

*Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, a corporation under the laws of Massachusetts, Plaintiff,

*vs.*

THE EAGLE COPPER AND SILVER MINING COMPANY, a corporation under the laws of California, Defendant.

For answer to the amended complaint of the plaintiff in the above-entitled action, the defendant therein states:

31 Said defendant denies that on the 28th day of February, A. D. 1879, or at any other time, the said plaintiff was seized or possessed as owner in fee, or otherwise, or at all, or was at any time, or now is, entitled to the possession of the mining claim, land, and premises, or any part thereof, described in said amended complaint.

Said defendant denies that on March 1st, A. D. 1879, or at any other time, it unlawfully entered upon said claim, land, or premises, or ousted said plaintiff therefrom, or from any part thereof, against its will or title, or otherwise, or that said defendant now unlawfully withholds, or at the commencement of this action, or at any other time, unlawfully withheld, the possession thereof, or any part thereof, from said plaintiff, or that said alleged withholding was to the damage of the plaintiff in the sum of $40,000, or any other sum whatever, or that the plaintiff has sustained damage in any

32 sum whatever by reason of any act or acts of the defendant in relation to the mining claims or property described in said amended complaint.

Said defendant alleges that it now is, and for more than two years last past has been, the owner in fee and in possession of said mining claim, land, and premises, and every part thereof.

Said defendant, for a further and separate defense herein, alleges that the said mining claim and premises described in said amended complaint is a part of the land belonging to the United States, containing valuable mineral deposits of gold, silver, and copper in lodes of quartz and other rock in place, and constitutes a mining claim upon such lodes of rock.

That since the 10th day of May, 1872, no labor has been performed or improvements made on said land, premises, or

33 mining claim, of any value whatever, by or for the plaintiff, or by any other person or persons under whom plaintiff claims title or right of possession to the same.

That on the 25th day of September, 1876, the grantors of the defendant entered upon and located the said land and premises as a lode mining claim, according to the laws of the United States and the local rules and regulations of miners of the mining district in which said mining claim is situated, and afterwards and before the commencement of this action conveyed the same to this defendant, who has been at all times since, and now is, the owner and in possession thereof.

That during each year since said location, the said defendant and its grantors have done and performed upon said claim more than ($100) one hundred dollars' worth of labor, and have in all
34 respects complied with the laws of the United States and the rules and regulations of said mining district.

For a further defense to said action the defendant alleges that since the commencement of this action, to wit, on the 19th day of July, A. D. 1879, it entered and purchased the land and mining claim described in said complaint from the Government of the United States in pursuance of an application to purchase the same theretofore duly made in the United States land office at Stockton, in the State of California, and paid therefor to the receiver of the said land office for said Government, the price of five dollars ($5) per acre, whereupon, to wit, on said 19th day of July, 1879, said receiver issued and delivered to the defendant a certificate in writing of such purchase and payment in due form of law, which cer-
35 tificate the defendant now holds; and that said purchase and payment were made and said certificate issued and delivered to the defendant in pursuance of chapter 6 of title XXXII of the Revised Statutes of the United States.

Wherefore defendant prays that it be dismissed hence with judgment for its costs.

STEWART, VANCLIEF & HERRIN,
*Attorneys for Defendant.*

STATE OF CALIFORNIA,
*City and County of San Francisco:*

F. W. Utter, being first duly sworn, deposes and says, that he is an officer, to wit, the secretary of the Eagle Copper and Silver Mining Company, the defendant in the above-entitled action; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and
36 as to those matters that he believes it to be true.

F. W. UTTER.

Subscribed and sworn to before me, this seventh day of August, A. D. 1879.

[SEAL.] J. H. BLOOD,
*Notary Public in and for the City and County of San Francisco, California.*

Endorsed: Filed Aug. 11th, A. D. 1879. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

37 *Findings.*

In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY. } No. 2056.

This cause came on regularly to be tried before the court sitting

without a jury, a trial by jury having been expressly waived by within stipulation of counsel, duly filed on the 2d, 3d, 12th, 13th, & 14th days of January, A. D. 1880, William C. Belcher and A. K. P. Joy, Esquires, appearing on behalf of plaintiff, and Wm. M. Stewart, P. Vanclief, and Wm. F. Herrin, Esquires, appearing on behalf of defendants; and the evidence taken herein, and the arguments of counsel having been heard and duly considered, and the
38 cause having been submitted to the court for consideration and decision, the court, being sufficiently advised in the premises, now finds the following facts:

I.

On the sixteenth day of April, 1877, and thenceforth down to and including the tenth day of October, 1879, the date of the patent hereinafter mentioned, the lands and premises described in the complaint herein, and being the same described in said patent, were public lands, belonging to the United States, containing valuable mineral deposits, carrying gold, silver, and copper, within the meaning of the provisions of chapter six, title XXXII, of the Revised Statutes of the United States, entitled "Mineral Lands and Mining Resources;" and as such mineral lands, were open to occupation and purchase by citizens of the United States, and those who have declared their intention to become such in pursuance of the
39 provisions of said chapter and title of the Revised Statutes.

II.

On said sixteenth day of April, 1877, the defendant herein filed an application for a patent for the premises in controversy, in all respects in accordance with and in pursuance of the provisions of said chapter and title of the Revised Statutes of the United States, in the public land office of the United States, at Stockton, that being the proper office, and performed the other acts in the premises required by said provisions; and thereupon the register of said land office published and posted the proper notices of such application, and said register and said applicant performed the other acts prescribed by the provisions of said statute.

III.

Afterwards, on the nineteenth day of June, 1877, and within due time and form, the plaintiff herein appeared at said land
40 office, set up an adverse claim to said premises, and filed a protest in due form against granting the said application of said defendant to purchase said mineral land; and thereupon the register of the land office, on said nineteenth day of June, 1877, ordered that said plaintiff, within thirty days thereafter, commence the proper proceedings in a court of competent jurisdiction, to determine the question of the right of possession to said mineral lands, and prosecute the same with reasonable diligence to final judgment, as required by the provisions of said statutes.

IV.

Afterwards and within due time, on the twelfth day of July, 1877, the plaintiff herein commenced in the proper State court an action, in the usual form of bringing an action by a party out of possession against a party in possession, to recover the possession of a
41 mining claim, in which the seizin of the plaintiff, and ouster, detention, and damage by the defendant, were alleged, and judgment for possession and damages prayed. The plaintiff was alleged to be seized on April 15, and the ouster by defendants to have been on April 16, 1877, and afterwards the plaintiff filed a copy of the record of said action in the office of the said register of the land office; and thereupon the said register suspended further proceedings upon said application for a patent pending said action.

V.

On August 18, 1877, the said action so commenced was, on application of the defendant, removed from the said State court to the circuit court of the United States for the ninth circuit and district of California, in pursuance of the statutes of the United States, and on August 21, 1877, the transcript of the record in said action
42 was filed in said United States circuit court.

VI.

On February 4, 1878, the defendant filed its answer, and on October 28 an amended answer to the complaint in said action, in which answer and amended answer it denied the allegation of the complaint, and then affirmatively alleged title in itself.

VII.

On the calling of the trial calendar on the first day of the July term, 1878, of said United States circuit court, in pursuance of the established rules and the practice of said court, the said action was specially set for trial for August 30, then next, and on the regular call of said action for trial on said August 30, the trial thereof was by consent of the respective attorneys reset for trial for November 27, then next.

On November 8, 1878, a stipulation by the respective at-
43 torneys was filed in said cause, reciting that the plaintiff desired to try said action at a later date, and stipulating that it should not be tried on November 27, but some time at the next November term of the court, on a day to be fixed by the court, on or before the first day of said next term.

On November 25, it being the first day of the November term of said court, 1878, upon a general call of the trial calendar for said term, in pursuance of the rules then in force of said court, said action was again specially set for January 7, 1879. In addition to the notice of the setting of said cause for trial for the day last aforesaid imparted, by the public calling and setting of the same for trial under the rules of the court, the defendant's attorneys, on November 26, 1878, served a notice in writing on the attorneys of plaintiff

in said action that the same had been set down specially for
44 trial by the court for January 7th, 1879.

VIII.

On said January 7, 1879, said action being regularly called for trial in pursuance of the said order setting the same down for trial on that day, the attorney for plaintiff, without any showing of diligence, either by affidavit or otherwise, asked for a further continuance, the plaintiff's witnesses not being present; to which defendant's attorney objected, on the ground that no diligence had been shown; and the court denied the application to continue.

It having been suggested that if plaintiff should dismiss the action a new action might be barred by the statute of limitations; on request of plaintiff's attorney, it was ordered that the action be dismissed, with leave to plaintiff to move the court to set aside the judgment of dismissal in said action if, upon the filing by the
45 plaintiff of any new complaint for the same cause of action within sixty days, the defendant should set up the statute of limitations as a defence thereto.

The order denying a further continuance, and for judgment of dismissal so entered by the court, is in the words following:

"THE BOSTON HYDRAULIC GOLD MINING CO.
*vs.*
"THE EAGLE COPPER AND SILVER MINING CO. *et al.*

"This cause coming on to be tried this day—George F. Sharp, Esq., appearing on behalf of plaintiff, and Wm. M. Stewart, of counsel for defendants—Geo. F. Sharp, Esq., moves the court that the trial of this cause be continued.

"Said motion having been argued by the respective counsel, Mr. Stewart having been heard in opposition thereto, and submitted to the court for condsideration and decision, and the same having
46 been duly considered, it is ordered that said motion be, and the same hereby is, denied.

"On motion of George F. Sharp, Esq., it is ordered that this cause be dismissed, with leave granted to plaintiff to apply to the court to set aside the judgment of dismissal herein, if, within the period of sixty days, said plaintiff files a new complaint, and defendant sets up the statute of limitations to any action commenced by plaintiff upon the same cause of action."

Upon said order, entered in the minutes of the court as aforesaid, a judgment of dismissal was entered in said action, in the following words:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, Plaintiff,
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY *et al.*, Defendants.
No. 1833.

47 "This action came regularly on for trial before this court, on this 7th day of January, 1879, Geo. F. Sharp, Esq., appearing as attorney for the plaintiff and Mess. Stewart, Vanclief, and Herrin as attorneys for the defendants; and plaintiff's attorney having moved said court to dismiss said action, it is ordered and adjudged that said action be, and the same is hereby, dismissed, and that defendants do have and recover from the plaintiff their costs herein, taxed at $477.10.

"Judgment entered the 7th day of January, 1879.

"L. S. B. SAWYER, *Clerk*."

The said November term of said court, at which said judgment was entered, finally adjourned on February 1, 1879.

The fact that said action had any relation to an application for a patent to said mining lands pending before the land office of the United States was not brought to the attention of the court
48 by the record in said action, or otherwise pending said action.

IX.

No application has been made to set aside the judgment, or the order for judgment, dismissing said action mentioned in the next preceding finding, in pursuance of the leave therein given, or otherwise, and the said judgment and order remain in full force and effect, no subsequent proceedings having been had or taken to affect the same, and no action has been commenced since the entry of said order and judgment by said plaintiff against said defendant to recover possession of said mineral land, wherein the said defendant has set up the statute of limitations as a defense, and no action has been instituted to recover possession of the same premises, other than the present action in which these findings are made.

X.

On March 3, 1879, more than thirty days, but within sixty
49 days after the entry of said judgment dismissing said action as in the preceding findings stated, the plaintiff filed in this action its complaint against the defendant to recover possession of the same mineral lands and premises as embraced in said former action, and on July 7, 1879, plaintiff filed an amended complaint therein. In said complaint and amended complaint the seizin is alleged to be on February 28, and the ouster to have been on March 1, 1879.

XI.

After the dismissal of said first named action, and before the 19th

day of July, 1879, the defendant filed a certified copy of said judgment of dismissal of said action in the said office of the register of the land office at Stockton, and after the commencement of said second action, and before said 19th day of July, 1879, the plaintiff filed in said land office proper evidence of the commence-
50 ment and pending of said second action, being the action in which these findings are made.

XII.

On July 19, 1879, the register and receiver of said land office at Stockton permitted the said defendant to purchase, enter, and pay for the said mineral land described in the complaint in this action in pursuance of its said application made April 6, 1877, and the said defendant, in pursuance of said application, and in all respects as provided in said chapter six, title XXXII, of the Revised Statutes of the United States, except so far as the same may be affected by the pendency of this action, did purchase, enter, and pay for the said mineral land the full price, at the rate of five dollars per acre, and the receiver of said land office, against the objection of said plaintiff, did accept and receive the said sum, and upon receipt thereof did, on said 19th day of July, 1879, execute, issue,
51 and deliver to said defendant a certificate in writing of said purchase and payment in due form of law.

XIII.

On August 11th, 1879, the defendant filed its answer to the plaintiff's aforesaid amended complaint in this action, in which answer the defendant denied the allegations of said amended complaint, and as a further answer alleged title in itself by virtue of a location made on September 25th, 1876, and subsequent working thereof in accordance with the rules and customs of miners in said district, and the acts of Congress applicable to the subject; also as a further answer alleged and set up its title, derived through the entry and purchase from the United States, and the certificate of such entry and purchase set forth in the last preceding finding.

XIV.

On October 10, 1879, a patent of the United States in due
52 and the usual form in such cases, embracing said mineral lands, purporting on its face to have been issued "in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two," signed by the President of the United States, R. B. Hayes, and S. W. Clark, recorder of the General Land Office, and duly recorded in volume 43, at pages 256 to 262 inclusive, was issued, notwithstanding and against this objection of said plaintiff, in pursuance of said application of April 16, 1877, and of said entry and purchase, and delivered to the defendant in this action.

XV.

On October 24, 1879, said defendant, by leave of the court first

had and obtained, filed its supplemental answer herein, setting up, in addition to said prior answers, and as a further answer to said amended complaint, title in said defendant, derived through and under said patent.

53 XVI.

The title relied on by plaintiff in this action was a right to the mineral land, described in the complaint, alleged to have been acquired by locations long prior to April 16, 1877, and afterwards maintained in accordance with the mining rules of the district including the same, and the laws of the United States applicable to the same, and plaintiff neither showed nor attempted to show any title originating or accruing on or subsequent to said sixteenth day of April, 1877, the date of the said application for a patent made by said defendant.

*Conclusions of Law.*

1.

That the said patent of the United States, from its date, vested the title to the premises in question in the defendant, and the
54 title being in defendant at the date of trial, the plaintiff is not entitled to recover possession, under section 740 of the Code of Civil Procedure.

2.

The patent in its operation relates to the date of the application upon which it was issued, April 16, 1877, and plaintiff having shown no title subsequently occurring, it is evidence of the right of possession in defendant at and from that date, which is long anterior to the commencement of this action, and also to the ouster alleged.

3.

The patent is conclusive of the rights of the parties in this action, and cannot be collaterally assailed in an action to recover possession of the premises. The other evidence presented as to the condition of the title of the respective parties prior to April 16, 1877, therefore, cannot be considered.

55 4.

The plaintiff's said first action commenced within thirty days after receiving due notice of defendant's application for a patent, having been finally dismissed, and no other action having been commenced within the time prescribed by statute, the proper officers of the United States land office were lawfully authorized to proceed and act upon defendant's application for a patent, and their action cannot be reviewed in this proceeding.

5.

The pendency of this action commenced long after the expiration

of thirty days prescribed by the statute, and also more than thirty days after the entry of the judgment dismissing the former action, was no obstacle in the way of the proceedings of the Land Department upon defendant's application for a patent.

6.

That defendant is entitled to judgment.

56 Let judgment be entered for defendant, with costs.

(Signed) LORENZO SAWYER,
*U. S. Circuit Judge, Ninth Circuit.*

JUNE 28, 1880.

Endorsed: Filed 28 June, 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

57 *Judgment.*

In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY.

This cause having come on regularly for trial on the 2d day of January, A. D. 1880, being a day in the November, 1879, term of said court, before the court sitting without a jury, a trial by jury having been waived by written stipulation of counsel for the respective parties, herein duly filed with the clerk of said court, W. C. Belcher and A. K. P. Joy, Esq's, appearing on behalf of plaintiffs,
58 and W. M. Stewart, P. Vanclief, and W. F. Herrin, Esq's, on behalf of the defendant; and the trial having been proceeded with upon the 3d, 12th, 13th, and 14th days of said January, and witnesses on the part of the plaintiff and of the defendant having been sworn and examined, and the evidence being closed, the cause, after arguments of counsel, having been submitted to the court for consideration and decision, and the court, after due deliberation, having filed its finding, in writing, and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the plaintiff take nothing by this action; that the defendant go hereof without day, and that the Eagle Copper and Silver Mining Company, defendant, recover from The Boston Hydraulic Gold Mining Company, plaintiff, its costs in this behalf expended, taxed at three hundred and eighty-nine $\frac{90}{100}$ dollars.

59 Judgment entered June 28, 1880.

L. S. B. SAWYER, *Clerk.*

Full satisfaction of the costs taxed in this case is hereby entered December the 13th, 1880.

STEWART, VANCLIEF & HERRIN.

A true, full, and correct copy of an original judgment entered in the above-entitled action.

Attest, &c.: L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Dep'y Clk.*

Endorsed: Filed June 28, 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

60 *Certificate to Judgment Roll.*

In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

THE BOSTON HYDRAULIC GOLD MINING CO.
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein entitled action.

Witness my hand and the seal of said circuit court, this 28th day of June, A. D. 1880.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

61 Endorsed: Judgment roll. Filed June 28, 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, deputy clerk.

62 *Bill of Exceptions.*

In the Circuit Court of the United States of the Ninth Judicial Circuit in and for the District of California.

THE BOSTON HYDRAULIC GOLD MINING COMPANY
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY. } No. 2056.

Be it remembered that on the twenty-eighth day of June, A. D. 1880, the court rendered its decision and its findings of facts in the above-entitled cause, with its conclusions of law upon said finding of facts separately stated and appended thereunto, which finding are annexed to the judgment roll herein, and in pursuance of said findings of fact and conclusions of law ordered that judgment be entered therein for defendant with costs; and thereupon the
63 said plaintiff, by its attorney, duly excepted to the said conclusions of law, and to the order and judgment entered in pursuance thereof, which exceptions were allowed by the court.

In testimony whereof, I, the said judge, before whom said cause was tried, have hereunto set my hand and seal, this the 13th day of September, A. D. 1880.

(Signed) LORENZO SAWYER. [SEAL.]
*Circuit Judge.*

Endorsed: Bill of exceptions. Filed Sept. 13th, 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

64 *Bond on Writ of Error.*

In the Supreme Court of the United States.

THE BOSTON HYDRAULIC GOLD MINING COMPANY, Plaintiff in Error,
*vs.*
THE EAGLE COPPER AND SILVER MINING COMPANY, Defendant in Error.

Know all men by these presents, that we, F. H. Waterman and Samuel J. Clarke, Jr., are held and firmly bound unto The Eagle Copper and Silver Mining Company, defendant in error, in the above-entitled action, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to said The Eagle Copper and Silver Mining Company, or its successors, to the payment of which, well and truly to be made, we bind
65 ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated the 30th day of September, 1880.

Whereas the above-named, The Boston Hyraulic Gold Mining Company, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the district of California, in the cause entitled The Boston Hyraulic Gold Mining Company *versus* The Eagle Copper and Silver Mining Company:

Now, therefore, the condition of the above obligation is such, that if the above-named, The Boston Hydraulic Gold Mining Company, plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then
66 this obligation shall be void, otherwise to remain in full force and virtue.

F. H. WATERMAN. [SEAL.]
SAMUEL J. CLARK, JR. [SEAL.]

Signed, sealed, and delivered in presence of—
SAM'L S. MURFEY.

UNITED STATES OF AMERICA, } ss:
*District of California,* }

F. H. Waterman and Samuel J. Clark, Jr., being duly sworn, each for himself, deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars, in lawful money of the United States of America, exclusive of property exempt from execution, and over and above all debts and liabilities.

F. H. WATERMAN.
SAMUEL J. CLARK, JR.

Subscribed and sworn to before me, this 30th day of September, 1880.

[SEAL.] SAM'L S. MURFEY, *Notary Public.*

67 Endorsed: The form of the within bond, and the sufficiency of the sureties thereon, are hereby approved. Signed, Lorenzo Sawyer, U. S. circuit judge, 9th circuit. Filed September 30th, A. D. 1880. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep'y cl'k.

68 I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify the foregoing sixty-seven written pages, numbered from 1 to 67, inclusive, are a full, true, and correct copy of all proceedings in the therein entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and seal of said circuit court, this 11th day of January, A. D. 1881.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE, *Deputy Clerk.*

Endorsed on cover: California C. C. U. S. No. 378. The Boston Hydraulic Gold Mining Company, plaintiff in error, *vs.* The Eagle Copper and Silver Mining Company. Filed October 10, 1881.

# IN THE SUPREME COURT OF THE UNITED STATES.

(October Term, 1885)

THE BOSTON HYDRAULIC GOLD MINING COMPANY,
*Plaintiff in Error,*

vs.

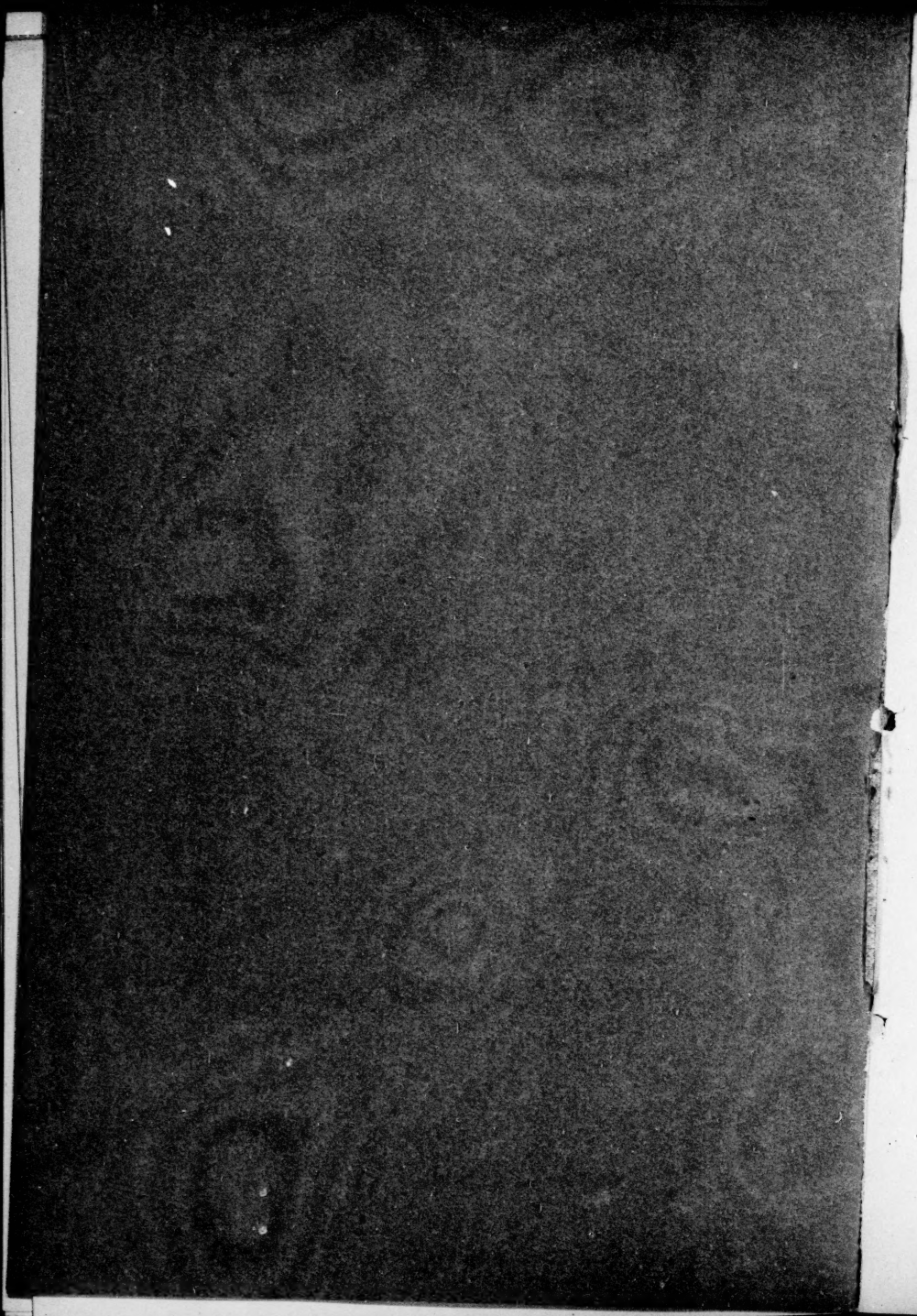
THE EAGLE COPPER AND SILVER MINING COMPANY,
*Defendant in Error.*

No.

**In Error to the Circuit Court of the United States for the District of California.**

# BRIEF FOR DEFENDANT IN ERROR.

GEO. A. NOURSE, Counsel.



# In the Supreme Court

OF THE

# UNITED STATES.

OCTOBER TERM, 1885.

THE BOSTON HYDRAULIC GOLD MINING COMPANY,
*Plaintiff in Error,*

vs.

THE EAGLE COPPER AND SILVER MINING COMPANY,
*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

This is an action in the nature of Ejectment, to recover possession of a mining claim in Calaveras County, State of California.

The plaintiff, a Massachusetts corporation, alleges, in its amended complaint (page 8 of Transcript):

"That on February 28, A.D. 1879, and long be-
"fore that date, the plaintiff was owner in fee,
"and entitled to the possession, and ever since

" the date last named has been such owner and " entitled to the possession of all that mineral " bearing or quartz lode, mining claim, or par- " cel of land," etc., etc.—describing it.

It will be seen that plaintiff is not alleged to have been *in possession* of the demanded premises, although it was alleged in the original complaint to have then been " seized and *possessed* as owner in fee." (Page 3 of Transcript.)

But the amended complaint goes on to allege, that " the plaintiff *being so possessed thereof* the said " defendant thereafterward, to wit, on March 1st, " A.D. 1879, unlawfully entered upon said premises, " and ousted said plaintiff therefrom against its " will and title, and said defendant still unlaw- " fully withholds the possession thereof from said " plaintiff, to its damage," etc., etc.

In its answer to amended complaint, defendant, a California corporation, does not deny entering upon the demanded premises, but says (fol. 33 of Transcript), that its grantors entered upon and located the ground as a lode mining claim, September 25th, 1876. It further alleges that it is, and for more than two years last past has been, the owner in fee *and in possession* of the demanded premises.

It fully traverses all the material allegations of amended complaint, denying (fol. 31, page 11):

1. That it entered unlawfully;

2. That it ousted plaintiff from the demanded premises;

3. That it unlawfully withholds possession;

4. That it has damaged plaintiff.

It then alleges that plaintiff has performed no work and made no improvements on the claim since May 10, 1872. This would be fatal to plaintiff's claim under the Act of Congress of that date, if proven.

17 Stat. at Large, 92, Sec. 5.

Nor could plaintiff establish any claim to the ground, as locator, or assignee of a locator under U. S. laws, without proving affirmatively ten dollars' worth of improvements made by it, or its grantors, for each one hundred feet located,—every year since May 10, 1872.

The defendant then sets up its own title; alleging—

1. The location of the claim by its grantors, September 25, 1876,—as hereinbefore suggested;

2. The conveyance of the claim by its said locators to defendant;

3. Present ownership of the claim by defendant;

4. More than $100 work done on the claim by defendant and its grantors each year since said location; and

5. Entry of the claim under Chap 6, Title XXXII, of U. S. Rev. Stat., as a mining claim, and purchase, and payment therefor, at the price of five dollars per acre, July 19, 1879, a certificate of purchase being issued under said entry, on said July 19, 1879.

The supplemental answer of defendant sets up the issuance, Oct. 10, 1879, of a U. S. patent to defendant of the demanded premises as a mineral claim, — under said entry and purchase. (Pages 17–18.)

Under these pleadings, of course, the question at *nisi prius* was, whether plaintiff was the owner of the mining claim in dispute, when the action was commenced; for no prior possession by plaintiff is alleged,—and it can be shown, "entitled to the possession" under these pleadings, only by proof of its *ownership*, as the *fact*, upon which the conclusion of law is based, that it is so "entitled to the possession."

The *ownership* claimed is evidently that of a locator under U. S. mining laws (folio. 21), for the amended complaint speaks of the demanded premises, as a "mining claim."

If it shall be held that the allegation of an ouster of plaintiff by defendant necessarily implies defendant's possession, the answer is, that the ouster is denied and no ouster is found by the Court.

There being no evidence or statement in the record, we can only look to the "FINDINGS" (pages 13–18 inclusive), to ascertain what was

proven at the trial. As they are not, in any way, challenged, we must, at this hearing accept them as absolutely true, and take the facts thus found as the foundation of our discussion of the law involved in the case.

**I.**

*No fact appears in the case even tending to show that plaintiff ever had title to the mining claim in dispute, or ever had any valid claim thereto under any mining location.*

Finding XVI is made, to show on what alleged title plaintiff relies;—not to establish any fact as to the validity, or invalidity of such alleged title. (Page 18.)

**II.**

*As the plaintiff in ejectment must recover, if at all, "upon the strength of his own title," of course this is fatal to any claim, that judgment should have been rendered in favor of plaintiff upon the findings.*

Plaintiff claiming right of possession only as *owner*, and establishing no fact tending to prove his ownership,—of course, judgment must go against him, and in favor of defendant,—even without any showing of a right or title in defendant. This is elementary;—"hornbook law."

If a judicial decision be necessary to establish this, however, it may be found in "*Gwillim* v. *Donnellan*," decided May 4, 1885, and reported in U. S. Supreme Court Reporter, vol. V, Part XXIV, page 1112.

## III.

*Nor can plaintiff find any comfort in the failure of the Court below to find directly upon the question of plaintiff's alleged ownership.*

The facts being found which show that defendant was the owner at and long before the commencement of this action, and so continued, it became unnecessary to find in terms upon plaintiff's alleged ownership.

Thus it was held, that plaintiff being found to have never had title, it was unnecessary to find upon defendant's plea of the Statute of Limitations.

57 Cal., 535, *Porter* v. *Woodward* (page 539).

Plaintiff is found to have a U. S. patent title, relating back, at least, to April 16, 1877;—nearly two years before the commencement of this action, in which the complaint was filed March 3, 1879.

Finding XVI shows that plaintiff made no claim of title originating or accruing after said April 16, 1877.

## IV.

*The only exception of plaintiff shown by the record, is to the Conclusions of Law, and the Order for Judgment, and the Judgment entered in pursuance thereof.*

These conclusions of law so clearly and admirably state the law upon the subject, that it will be hardly necessary to argue them. I will merely repeat them, one by one, citing only the statute and the reported cases, on which they severally stand.

They are as follows:

### CONCLUSIONS OF LAW.

### 1.

" *That the said patent of the United States, from its* " *date, vested the title to the premises in question in the* " *defendant; and the title being in defendant at the* " *date of trial, the plaintiff is not entitled to recover* " *possession under Section* 740 *of the Code of Civil* " *Procedure.*"

The first clause of this finding has been settled law ever since.

*Bagnell* v. *Broderick*, 13 Pet., 150.

I confess that I do not see the pertinency of the last proposition, although it is a truism. Inasmuch as it does not appear that plaintiff " had " a right to recover at the time the action was " commenced,"—nor " that his right has termi- " nated during the pendency of the action," I do

not see that Section 740 has anything to do with this case. Perhaps that is what the Court below means to say. The next conclusion of law is:

## 2.

"*The patent, in its operation, relates to the date of* "*the application upon which it was issued, April* 16, "1877; *and plaintiff having shown no title subse-* "*quently accruing, it is evidence of the right of posses-* "*sion in defendant at and from that date, which is* "*long anterior to the commencement of this action, and* "*also to the ouster alleged.*"

That a patent of the United States takes effect as of the date of the first step in the series of acts which have resulted in the issuance of such patent, has been so often decided as to become an axiom. I will not undertake to exhaust the list of such cases, but will cite a few only, with the suggestion added, that no case can be found in conflict with them. In—

17 Cal., 250, *Ely* v. *Frisbie* (p. 259),

the Supreme Court of California says that the patent, issued upon a Mexican grant, the claim for which was presented to the Board of Commissioners under the Act of Congress of March 3, 1851,—"took effect, as the deed of the United "States, at the date of the presentation of the "claim under the grant to the Board of Land "Commissioners in August, 1852." In—

18 Cal. 11, *Teschemaker* v. *Thompson* (page 26.)

The same Court says:

"The patent, it is true, as the deed of the "United States, takes effect only from the date "of the presentation of the petition of the pa- "tentees to the Board of Land Commissioners.

"*Moore* v. *Wilkinson*, 13 Cal., 488;

"*Yount* v. *Howell*, 12 id., 469;

"*Stark* v. *Barrett*, 15 id., 386.

"But as the record of the Government, of the "existence and validity of the grant, it estab- "lishes the title of the patentees from the date "of the grant."

The same Court says, in *Leese* v. *Clark*, 18 Cal., 535. (Page 571:)

"As to the operation and effect of this patent, "there can be no question. It is the last act of "a series of proceedings taken for the recogni- "tion and confirmation of the claim of the "patentees to the land it embraces, the first of "which was the petition to the Board of Land "Commissioners.

"With respect to such proceedings, it takes "effect, by relation, at the date of the first Act. "As the deed of the United States, it is to be "regarded, as if it had been executed at that "time."

So the Supreme Court of the United States has held in 3 Wallace 478, *Beard* v. *Federy*. (Page 491).

"In the first place, the patent is a deed of the "United States. As a deed, its operation is that "of a quit claim, or rather of a conveyance of "such interest as the United States possessed "in the land, and it takes effect by relation, at "the time when proceedings were instituted by "the filing of the petition before the Board of "Land Commissioners."

It can hardly be necessary to cite more authority to support a proposition so plain in itself as this second Conclusion of Law.

In the case at bar, the first act shown to have been performed with a view to obtaining from the United States title to the mining claim in question was, the application of defendant made at U. S. Land Office, April 16, 1877, for a U. S. patent for said claim. This is shown to have culminated in the issuing of such patent, which of course, relates back to this first step, as shown by the authorities above cited.

The next *Conclusion of Law* is:

## 3.

*The patent is conclusive of the rights of the parties in this action, and cannot be collaterally assailed in an action to recover possession of the premises. The other evidence presented as to the condition of the title of the respective parties prior to April* 16, 1877, *therefore, cannot be considered.*

This is the law in a nutshell, of title to mineral ground under U. S. patent. To understand its application precisely, let me rehearse the material facts, as established by the findings.

## A.

April 16, 1877, and thereafter to and including October 10, 1879, at which last date U. S. patent was issued therefor, the demanded premises were mineral lands of the U. S.—open to occupation and purchase under Chapter 6, Title XXXII, of Rev. Stat. of United States.

## B.

April 16, 1877, defendant filed in proper U. S. Land Office (at Stockton) its application for a U. S. patent for this ground, under said chapter, and in accordance with the laws. (Sect. 2325, Rev. Stat. of U. S.)

Thereupon the Register published and posted notice of said application in conformity with law, and said Register and said applicant performed all other acts in such case required by said statute.

## C.

June 19, 1877, plaintiff filed its adverse claim to said mineral ground, within sixty days after first publication, etc., of said notice, as required by law.

If no such adverse claim had been so filed within said sixty days, it would have been "as- "sumed that the applicant is entitled to a "patent, upon the payment to the proper officer "of five dollars per acre, and that no adverse "claim exists; and thereafter no objection from "third parties to the issuance of a patent shall "be heard, except it be shown that applicant "has failed to comply with the terms of this "chapter."

See final paragraph of said Sect. 2325.

Upon filing said adverse claim, it became "the "duty of the adverse claimant, within thirty "days after filing his claim, to commence pro- "ceedings in a Court of competent jurisdiction, "to determine the question of the right of pos- "session, and prosecute the same with reasonable "diligence to final judgment; *and a failure to do* "*so shall be a waiver of his adverse claim.*"

It is found, needlessly, that the U. S. Register *ordered* plaintiff to commence such suit within thirty days after the filing of said adverse claim. (Finding III).

## D.

July 12, 1877, and within said thirty days, plaintiff commenced such action, in the proper State Court, which was afterwards transferred to U. S. Circuit Court, for the District of California.

January 7, 1879, said action was dismissed by said Court, and judgment of dismissal entered therein. (Findings VII and VIII).

No application has ever been made to set aside the judgment, or order for judgment of dismissal, which both remain in full force and effect. (Finding IX.)

March 3, 1879,—being one year eight months and twelve days after plaintiff filed his adverse claim in U. S. Land Office,—and one year seven months and twelve days after its thirty days allowed for commencing such suit had elapsed, said plaintiff commenced *this* action in the U. S. Circuit Court for the District of California.

No other suit than these two is shown to have been commenced by plaintiff, as to the right of possession of this land.

## E.

After the dismissal of said first action, and before July 19, 1879, defendant filed with said Register of Stockton Land Office, a certified copy of said judgment of dismissal.

After the commencement of this action (the second one as aforesaid), and before said July 19, 1879, plaintiff filed with said Register proper evidence of the pendency of this second action,—so as aforesaid commenced March 3, 1879. (Finding XI.)

## F.

July 19, 1879, with these facts thus before them, the Register and Receiver of said U. S. Land Office allowed defendant to enter, purchase and pay for said mineral land, in pursuance of its said application for a patent, filed April 16, 1877.

Defendant did, in accordance with law, then and there enter, purchase, and pay five dollars per acre for said mineral land, and thereupon said Receiver issued to defendant a certificate of purchase therefor.

In its answer to plaintiff's amended complaint, this entry, purchase, payment and certificate of purchase are set forth. (Page 12, fol. 34 of Transcript; see also Finding XII, p. 17.)

G.

On this entry, a patent from the United States for this mining claim was issued to defendant, as patentee, on the tenth day of October, 1879, in pursuance of said application of defendant for such patent.

The issuance of this patent was pleaded by defendant in its supplemental answer to the amended complaint of plaintiff, filed October 24, 1879, by leave of Court. (Findings XIV and XV, pp. 17–18.)

It is this patent, which the third conclusion of law holds to be conclusive of the rights of the parties to this action, and unassailable collaterally.

To cite the authorities supporting this doctrine, would be to call up almost the whole body of land law, as established by decisions of the Supreme Court of the United States, and the State of California.

That a Court cannot go behind a U. S. patent, in an action of ejectment, has been held by this Court in—

19 How., 323, *Field* v. *Seabury*, (p. 332);
3 Wallace, 478, *Beard* v. *Federy*, (p. 492).

The conclusiveness of a U. S. patent, as evidence of title, was first laid down by the Supreme Court of California, in—

13 Cal., 373, *Waterman* v. *Smith*.

At page 419, that Court says: "The patent is "conclusive evidence of the right of the patentee "to the land described therein—not only as be- "tween himself and the United States, but as "between himself and a third person, who has "not a superior title from a source of paramount "proprietorship."

This has been again and again repeated and reiterated by the same Court.

See—

13 Cal., 478, *Moore* v. *Wilkinson*, (p. 487).

"It cannot be attacked collaterally, even for "fraud, whether charged to have existed in the "procurement of the original grant, or in the "proof of its execution, or in the making of the "survey."

16 Cal., 295, *Doll* v. *Meeder*, (p. 326).

"But upon this proposition, that a person with- "out title from a common or paramount cource, "cannot attack and overturn, in an action of "ejectment, a patent which is regular upon its "face, there is no difference of opinion." Citing—

4 Bibb., 329, *Bledsoe's Devisees* v. *Well.*

"If, therefore, the patent be illegal upon its "face, it is itself record evidence of the matter "which render it a nullity; but if it be legal "and perfect upon its face, it is a record of the "title having passed to the grantee, and it can-

" not regularly be defeated, but by matter of as
" high a nature."

1 Munford, 134, *Alexander* v. *Greenup;*
9 Ala., 594, *Cromelin* v. *Mintrie;*
18 How., 176, *Cooper* v. *Roberts.*

See, also—

29 Cal., 309, *Hagar* v. *Lucas.*

In—

38 Cal., 80, *Durfee* v. *Plaisted,*

the Court says (page 83):

" The patent is the record of the Government,
" that the land was subject to entry by the pat-
" entees under the Act of Congress, and was en-
" tered by them in conformity to law; and is
" conclusive evidence of the regularity, as well
" as the validity, of the action of the officers in
" passing upon and finally confirming their claim
" as purchasers from Vallejo, or his assigns."

Citing—

16 Cal., 324, *Doll* v. *Meader;*
25 Cal., 251, *People* v. *Stratton;*
27 Cal., 483, *Page* v. *Hobbs;*
28 Cal., 100, *Carder* v. *Baxter;*
29 Cal., 312, *Hagar* v. *Lucas.*

See, also:

45 Cal., 527, *Chipley* v. *Farris* (page 539).

But it is unnecessary to cite these old cases, save to show how long settled and uniform the rule is.

Only three years since, the whole question was again gone over by this Court, in—

*Steel* v. *Smelting Company*, 106 U. S., 447.

In that case the Court says, at page 452:

"It is among the elementary principles of the "law, that, in actions of ejectment, the legal title "must prevail. The patent of the United States "passes that title. Whoever holds it must re- "cover against those who have only unrealized "hopes to obtain it, or claims, which it is the "exclusive province of a Court of equity to en- "force."

*Cites and approves:*

104 U. S., 636, *Smelting Co.* v. *Kemp.*

The law on this question is laid down at length, and in a masterly manner, in this last named case, at page 641.

That the decision of the U. S. Land Officers, in passing upon the *facts* involved in the issuing of a patent for land of the United States, is *conclusive* upon all tribunals ever after,—and that errors in law in issuing such patent can only be reviewed by the Courts in a proceeding instituted directly for that purpose, *vide:*

13 Wallace, 72, *Johnson* v. *Towsley* (page 86);

*French* v. *Fyan*, 93 U. S., 169; (page 171).

The fourth and fifth conclusions of law may best be considered together. They are as follows:

4.

*The plaintiff's first action, commenced within thirty days after receiving due notice of defendant's application for a patent, having been finally dismissed, and no other action having been commenced within the time prescribed by statute, the proper officers of the United States Land Office were lawfully authorized to proceed and act upon defendant's application for a patent; and their action cannot be reviewed in this proceeding.*

5.

*The pendency of this action, commenced long after the expiration of thirty days prescribed by the statute, and also more than thirty days after the entry of the judgment dismissing the former action, was no obstacle in the way of the proceedings of the Land Department upon defendant's application for a patent.*

I doubt if argument or authority can add to the force or clearness of this mere statement of the law in the mind of any one who has read the U. S. Statutes upon this matter of acquiring title to U. S. mineral lands.

Chapter six (6) of Title XXXII.

The United States Statute which provides for the sale by the United States of its mineral lands, after providing how locations of mining claims on such lands are to be made (Sections 2318–2324, inclusive, of Revised Statutes), goes on in Sections 2325–6 to provide how U. S. patents may be procured for lands so located.

The locator files with the officers of the proper

U. S. Land Office, an application for such patent, with *ex parte* proof under oath, of his compliance with the U. S. Statutes in locating his claim and in doing work thereon from year to year. The diagram of a survey of his claim, and the other papers required, are filed with the application, and sixty days' notice of the application is given by posting and publication.

Any one having an adverse claim to any of the mineral ground for which patent is sought, must thereupon file his adverse claim within the sixty days of publication. If he fails to do this he is thenceforth forever barred to assert anywhere such adverse claim, and it is assumed that the applicant is entitled to a patent, on paying the purchase price.

Vol. V. Sup. Court Reporter, Part XXIV, p. 1110; *Gwillim* v. *Donnellan*, p. 1111.

If any adverse claim is filed, as was done by plaintiff in this case, all proceedings are stayed, until it is disposed of, and the adverse claimant must, *within thirty days*, commence proceedings in a Court of competent jurisdiction, to determine the question of right of possession, as between the rival claimants,—and to prosecute the same to final judgment, with reasonable diligence.

After judgment rendered, the party entitled may file in the U. S. Land Office the judgment roll in the action,—showing himself so entitled to the claim,—and, upon payment of five dollars

per acre, enter the claim; and thereupon a patent from the U. S. shall issue to him therefor.

It is thus only the suit commenced within 30 days after filing adverse claim, which can stay proceedings in the U. S. Land Office, for obtaining U. S. patent for mineral lands. No such suit is in existence. That was dismissed long before the commencement of this action.

This dismissal was equivalent to a decision therein in favor of defendant, and upon filing in U. S. Land Office the judgment roll showing such dismissal, said defendant, applicant for such patent, became and was entitled to a patent for the claim, as if no suit had been commenced.

## RESUMÉ.

So, this is a mere action, in the nature of ejectment, to recover possession of the mining claim in dispute. Judgment was properly rendered therein for defendant, because—

**I.**

The complaint alleges ownership, but there is no evidence tending to prove that plaintiff ever had any right, title or interest in or to the demanded premises.

**II.**

If the allegation of defendant's entry, "the defendant being so possessed" of the demanded premises, shall be deemed a sufficient allegation of an ouster, there is no evidence tending to show possession by plaintiff prior to defendant's entry, and so no evidence tending to prove an ouster. The finding is that at the time of defendant's entry, the demanded premises were "public lands belonging to the United States, etc." This finding is in no way challenged.

**III.**

Defendant proves its title by U. S. patent, issued to itself *pendente lite*, and pleaded by supplemental answer.

**IV.**

Plaintiff fails to show itself in any position to challenge this patent in any action. It shows no privity whatever with the United States.

**V.**

In no event could this patent be attacked in an action of ejectment, or, collaterally, in any action. It could only be attacked in an action brought by the United States directly for that purpose, upon a showing that it was issued without authority, or that, for some fraud or mistake in its issuance, it was void.

## VI.

This patent, relating back to April 16, 1877, vested the title in defendant as of that date.

And so the judgment must be affirmed.

GEO. A. NOURSE,
Counsel for Defendant in Error.